Frick, Vass & Street, Inc., t/a T. F. Frick & Co. *and* International Brotherhood of Painters and Allied Trades, Local Union No. 1018, AFL-CIO. Case 5-CA-15578

4 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 19 January 1984 Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 7.

"7. By changing the overtime provision on 2 May and the wage rates on or about 15 May without notifying the Union and affording it an opportunity to negotiate thereon, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act."

2. Insert the following as Conclusion of Law 8, and renumber the subsequent conclusion accordingly.

"8. By dealing directly with employees who are represented by the Union regarding wages, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Frick, Vass & Street, Inc., t/a T. F. Frick & Co., Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

"(b) Dealing directly with employees who are represented by the Union regarding wages."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Painters and Allied Trades, Local Union No. 1018, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit with regard to rates of pay, wages, hours, and other terms and conditions of employment:

> All painters, decorators, paperhangers, sand blasters and other branches of the trade, over which the Union has jurisdiction on all matters pertaining to terms and conditions of employment in the area over which the Union has jurisdiction.

WE WILL NOT fail and refuse to abide by the terms of the collective-bargaining agreement between our Company and the above-named labor organization, effective by its terms from 1 May

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also excepts to the judge's finding that the Union timely requested the Respondent to negotiate for a new contract. The Respondent points out that it gave written notice of its intent to terminate the contract and claims that the Union, by not putting a bargaining request in writing, failed to comply with a contractual provision purportedly requiring that bargaining requests be in writing. The contract specifically provides for automatic renewal of its terms unless a party gives written notice that it desires to make contractual changes, but does not specify the manner in which a response to written notice must be made. In these circumstances, we find, in agreement with the judge, that a "valid request to bargain need not be made in any particular form . . . so long as the request clearly indicates a desire to negotiate . . . ." *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971). We also find that the Union's three requests were valid requests to bargain.

In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by informing employees that the Company would no longer be "union."

[2] The judge concluded that the Respondent violated Sec. 8(a)(5) and (1) of the Act by dealing directly with the unit employees regarding wages. The General Counsel has excepted to the judge's inadvertent omission of this conclusion from the Conclusions of Law and the Order. We modify the Conclusions of Law and Order accordingly.

We also note that Conclusion of Law 7 states that the Respondent changed wage rates about 7 June 1983, although it is clear from the judge's findings of facts and the record evidence that this change occurred about 15 May 1983. We shall conform the Conclusions of Law accordingly.

We also modify the judge's remedy to make clear (in accord with his findings) that the "make whole" provision applies to all employees who suffered as a result of the Respondent altering the overtime rates.

Finally, we conform the notice to accord with the judge's Order.

1980 through 30 April 1983, until changed in accordance with our bargaining obligations under the National Labor Relations Act.

WE WILL NOT deal directly with our employees concerning rates of pay, wages, hours of employment, and other terms and conditions of employment in derogation of their exclusive bargaining representative.

WE WILL NOT tell our employees that we are going nonunion and unlawfully withdraw recognition of the Union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the above-described unit with regard to rates of pay, wages, hours, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

WE WILL forthwith revoke the unilateral changes regarding overtime provisions and wage rates and pay all of our employees at the wage and overtime rates provided in our collective-bargaining agreement with the Union, effective from 1 May 1980 to 30 April 1983, until such rates are changed in accordance with our bargaining obligations under the National Labor Relations Act.

WE WILL make our employees whole for any loss of earnings they may have suffered because of our unilateral modification of the wage rates and/or overtime provisions provided in our collective-bargaining agreement with the Union.

FRICK, VASS & STREET, INC., T/A T. F. FRICK & CO.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On charges filed in Case 5-CA-15578 by International Brotherhood of Painters and Allied Trades, Local Union No. 1018, AFL-CIO (the Union), against Frick, Vass & Street, Inc., t/a T. F. Frick & Co. (Respondent), the Regional Director for Region 5 issued a complaint and notice of hearing on August 16, 1983.[1] An amended complaint was issued on October 3.

The complaint alleges, inter alia, that Respondent and the Union have been parties to a collective-bargaining agreement which expired April 30. Further, that since June 7, Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act), 29 U.S.C. Sec. 151 et seq., by unilaterally departing from and abrogating provisions of the expired collective-bargaining agreement. In addition, the complaint alleges that Respondent unlawfully withdrew recognition from the Union as the exclusive collective-bargaining representative of the employees in an appropriate unit[2] on or about May 1 and has since failed and refused to bargain in good faith with the Union. Respondent's answer admits certain allegations of the complaint, denies others, and specifically denies the commission of any unfair labor practices.

A hearing was held in this matter on October 24 in Richmond, Virginia. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Briefs were submitted by all parties and have been duly considered.

On the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Virginia corporation which maintains its principal office and place of business in Richmond, Virginia, where it is engaged in the business of a painting contractor, performing painting, wall covering, and drywall finishing for commercial and residential properties. During the past calendar year, Respondent in the course and conduct of its business operations performed services valued in excess of $50,000 for enterprises within the Commonwealth of Virginia, which are engaged directly in interstate commerce. The parties stipulated, and I find, that Respondent is, and has been at all material times herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Painters and Allied Trades, Local Union No. 1018, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent is a painting contractor in Richmond, Virginia. Since approximately 1970, Respondent has been a member of the Virginia Association of Contractors, Inc., a multiemployer association. As a result of its affiliation with the employer association, Respondent has been a party to several collective-bargaining agreements with the Union, including a 3-year collective-bargaining agreement which expired April 30. (G.C. Exh. 2.) Respondent withdrew from the employer association in January and informed the Union accordingly by letter dated

[1] Unless otherwise indicated, all dates herein refer to 1983.

[2] The unit is defined as follows:

All painters, decorators, paperhangers, sandblasters and other branches of the trade, over which the Union has jurisdiction on all matters pertaining to terms and conditions of employment in the area over which the Union has jurisdiction.

January 26. (G.C. Exh. 3.) Respondent sent a second letter on the same date advising the Union of its intention to terminate the collective-bargaining agreement. (G.C. Exh. 4.) It is the events subsequent to the January 26 letters that give rise to the issues involved in this case.

B. *Respondent's Alleged Failure and Refusal to Bargain with the Union*

In late February or early March, Thomas Palmer, business representative for the Union, visited Edwin Holloway, president of Respondent. According to Palmer, he introduced Holloway to the new representative of the Union's international office. Palmer testified that he asked Holloway if he could be persuaded to continue bargaining with the Union and offered to do all he could to work with Respondent. Holloway replied that he had given the matter careful consideration and decided to withdraw from the Union. Palmer testified further that the parties discussed work in general. He stated that he told Holloway he always considered them to have good working relations but now they were on opposite sides. According to Holloway, however, there was no mention of bargaining or negotiating at the meeting. Instead, Holloway testified, the international representative was introduced and the parties discussed the status of work and whether the Union could help in some manner.

Holloway and Palmer had two telephone conversations subsequent to the meeting. Palmer testified that the first conversation occurred several weeks after the meeting. Palmer inquired as to Respondent's work situation and requested that Holloway consider bargaining with the Union, to which Holloway replied he had not changed his mind. Holloway, on the other hand, testified there was no mention of bargaining during the conversation. Subsequently, the parties had a second telephone conversation. According to Palmer's testimony, he repeated his request that Holloway consider a working agreement with the Union. Holloway replied that he did not feel an agreement would be beneficial to Respondent. Holloway testified, however, that Palmer telephoned him approximately 2 weeks prior to the expiration of the collective-bargaining agreement and asked if the parties could work something out. Holloway responded his letter spoke for itself (referring to the January 26 letter). According to Holloway, his interpretation of Palmer's request to "work something out" was "nothing specifically." Holloway stated that Palmer did not make a request to negotiate or bargain.

C. *The Alleged 8(a)(1) Violation*

Floyd W. Mason, employed as a painter for Respondent at the time of the hearing, testified that on or about May 2, Holloway conducted a meeting at Respondent's office. Approximately six employees were present. According to Mason, Holloway told the employees that Respondent no longer belonged to the Union and that while current employees would not take a pay reduction, time-and-a-half would no longer be paid after 8 working hours but only after 40. No other testimony with regard to the May 2 meeting was introduced.

D. *The Unilateral Reduction of Wages*

Approximately May 15, Holloway telephoned employees Mason and Steve Davis, both of whom were then on layoff status, and offered them a chance to return to work if they were willing to take a pay cut. The existing wage rate had been $10.80 or $11.20 per hour, depending on whether the employee performed residential or commercial work. Holloway offered the two employees $9.50 per hour and informed them that Respondent could no longer afford to pay the existing wage rate. Both employees accepted the offer and returned to work at the lower wage rate.

Concluding Findings

Respondent defends this case on the grounds that the Union never requested that bargaining for a new agreement take place. Next, Respondent contends that the Union was obligated to put its request to bargain and negotiate in writing, based on article XVIII[3] of the now expired collective-bargaining agreement. Therefore, according to Respondent, it was free to repudiate the collective-bargaining agreement and withdraw recognition from the Union by written notice pursuant to article XVIII of the collective-bargaining agreement without violating Section 8(a)(5) of the Act.

The General Counsel, on the other hand, argues that while it is true that the Union did not serve Respondent with a written request to bargain and negotiate, the Union, by its business agent Palmer, made three oral requests of Respondent to do so. Thus, the General Counsel contends that a valid request for bargaining was made.

In analyzing these contentions, I am of the opinion that the record here supports the finding of a violation of the Act. Although Holloway denied that Palmer requested Respondent bargain with the Union, I do not credit his testimony in this regard. Palmer impressed me as a candid and forthright witness intent upon giving an accurate account of his conversations with Holloway. Furthermore, I find Holloway's statement that Palmer never mentioned negotiating a new agreement to be implausible. This is especially true since the three conversations occurred well after the union representative had received written notification of Respondent's intention to terminate the collective-bargaining agreement upon its expiration, as well as notification that Respondent had withdrawn from the employer association. My assessment of Holloway's lack of candor on this point is further rein-

[3] Art. XVIII provided:

> This Agreement shall become effective on the 1st day of May, 1980, and shall continue in full force and effect until Midnight, April 30, 1983. Should either party hereto desire changes in any of the provisions of this Agreement, then in that event he or it shall give not less than ninety (90) days written notice to the other prior to April 30, 1983. Such notice shall be deemed to have been given when it shall have been properly addressed to the Association or to the Union, as the case may be, and shall have been deposited in the mails in Richmond, Virginia. If no such notice shall be given, this Agreement shall automatically renew itself and remain in full force and effect from year to year thereafter unless proper notice to terminate or modify the Agreement is given at least ninety (90) days prior to any subsequent anniversary date. [G.C. Exh. 2.]

forced by his own testimony regarding the third conversation, which occurred 2 weeks prior to the expiration of the collective-bargaining agreement. Holloway acknowledged that Palmer asked if they could work something out and he replied that the January 26 letter spoke for itself. His attempt to characterize Palmer's request as "nothing specifically" is not convincing and evinces his willingness to make dissembling statements in order to conceal the facts.

Accordingly, I find that on three separate occasions—at the direct meeting in late February or early March and during the two subsequent telephone conversations—the union representative requested that Respondent's president bargain for a new agreement and the requests were refused. Nor does Respondent's contention that the request to bargain had to be in writing pursuant to article XVIII of the agreement vitiate the effectiveness of the oral requests. "The Board and the courts have repeatedly held that a valid request to bargain need not be made in any particular form, or *in haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Marysville Travelodge*, 233 NLRB 527, 532 (1977), citing *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971). I find, therefore, that by its refusal to bargain with the Union, upon request, Respondent has violated Section 8(a)(5) and (1) of the Act.[4]

I also find the uncontroverted facts here establish that Respondent violated Section 8(a)(1) of the Act when Holloway met with the employees on May 2. At this meeting he informed the employees the contract was terminated, the Respondent would no longer be "union," and unilaterally changed the terms of the overtime provisions of the expired agreement. I find that, in so doing, Holloway unlawfully interfered with the Section 7 right of the employees to bargain collectively through their union regarding their wages and terms and conditions of employment. Compare *Rockland Lake Manor*, 263 NLRB 1062, 1069 (1982).

Finally, it is readily apparent that Respondent unilaterally altered terms and conditions of the expired agreement and engaged in direct dealings with unit employees. It is settled law that, upon contract expiration, an employer must continue to apply the contract terms and conditions governing the employer-employee, as opposed to the employer-union, relationship unless the employer gives timely notice of its intention to modify a condition of employment *and* the union fails to timely request bargaining, or impasse is reached during bargaining over the proposed change. *Bay Area Sealers*, 251 NLRB 89, 90 (1980), and the cases cited therein. Additionally, an employer violates its duty to bargain under Section 8(d) of the Act when it unilaterally changes employment conditions without first giving the employees' collective-bargaining representative prior notice and adequate opportunity to negotiate, in the absence of certain circumstances (not present here) excusing or justifying unilateral action. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982), citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 425 (1967), and *NLRB v. Katz*, 369 U.S. 736 (1962).

The record here conclusively establishes that while Respondent gave timely notice of its intention to terminate the collective-bargaining agreement upon its expiration date, it refused to act on the Union's several timely requests to bargain, thereby foreclosing the Union from any opportunity to negotiate concerning the employment conditions unilaterally altered by Respondent. In so doing, Respondent here has violated Section 8(a)(5) and (d) of the Act.

Further, it is established law that an employer violates Section 8(a)(5) and (1) of the Act by meeting and discussing changes in wages with employees without the presence of their collective-bargaining representative. *Ross Crane Rental Corp.*, 267 NLRB 415 (1983); *Limpco Mfg.*, 255 NLRB 987 (1976); *Bueter Bakery Corp.*, 223 NLRB 888 (1976). Here Respondent's president met with the employees on May 2 and informed them the overtime wage provisions would be changed, and later offered Davis and Mason recall to their jobs at a lower wage rate. This was inconsistent with Respondent's bargaining obligation. Additionally, such direct dealing tended to undermine the status of the Union as the bargaining representative and interfered with the employees' Section 7 rights. *Ross Crane Rental*, supra.

Accordingly, I find that by dealing directly with the unit employees concerning wages, Respondent has further violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Frick, Vass & Street, Inc., t/a T. F. Frick & Co., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Painters and Allied Trades, Local Union No. 1018, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The above-named labor organization has been, and is now, the exclusive representative of all of the employees in the unit described below for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All painters, decorators, paperhangers, sandblasters, and other branches of the trade, over which the Union has jurisdiction on all matters pertaining to terms and conditions of employment in the area over which the Union has jurisdiction.

5. By refusing to bargain with the Union on or after March 1, 1983, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By informing its employees that it would no longer deal with the Union, as their collective-bargaining agent, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[4] It should be noted at this point that there is no claim here that the Union lost its majority support among the unit employees.

7. By changing the overtime provisions on May 2 and the wage rates on or about June 7 without notifying the Union and affording it an opportunity to negotiate thereon, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

8. The above conduct constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent shall recognize and bargain in good faith, on request, with the Union, and revoke, on the Union's request, any and all unilateral changes commencing May 1, 1983, in the terms and conditions of employment of its unit employees, *Kal-Equip Co.*, 237 NLRB 1234 (1978). Further, Respondent shall be required to continue in full force and effect, retroactively to May 1, 1983, all terms and conditions of the contract which expired April 30, 1983, until such time that it reaches agreement or bargains in good faith to impasse with the Union, or the Union refuses to bargain on such matters. If an understanding is reached, it shall be embodied in a signed agreement. Respondent shall also be ordered to make whole employees Steve Davis and Floyd Mason for any loss of wages suffered as a result of Respondent's alteration of the overtime provisions and reduction of the hourly wage rate of the recently expired collective-bargaining agreement. Interest thereon shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*,[5] 231 NLRB 651 (1977).[6]

ORDER

The Respondent, Frick, Vass & Street, Inc., t/a T. F. Frick & Co., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with International Brotherhood of Painters and Allied Trades Union, Local No. 1018, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All painters, decorators, paperhangers, sandblasters and other branches of the trade, over which the Union has jurisdiction on all matters pertaining to terms and conditions of employment in the area over which the Union has jurisdiction.

(b) Unilaterally changing the wage rate and the overtime provisions of the unit employees without prior notice to, and consultation with, the Union.

(c) Informing employees that it no longer belonged to the Union.

(d) In any like or related manner interfere with, restraining, or coercing employees in the exercise of the rights protected under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit regarding wages, hours, and other terms and conditions of employment and embody in a signed agreement any understanding reached.

(b) Revoke the unilateral changes made in the wage rates and overtime provisions and pay to all unit employees the rates set forth in the collective-bargaining agreement effective from May 1, 1980, to April 30, 1983, until such time as the said wage rates and overtime provisions are changed consistent with Respondent's bargaining obligations under Section 8(d) of the Act.

(c) Make whole employees for any loss of earnings suffered by reason of Respondent's unlawful modification of the contractual wage rates and overtime provisions in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Richmond, Virginia, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."